APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 437—August Term, 1981

(Argued: December 10, 1981 Decided: February 8, 1982)

Docket No. 81-7332

FRANK REISNER, d/b/a INTERMECCANICA AUTOMOBILI, and INDRA IMPORTS, INC.,

Plaintiffs-Appellants,

—against—

GENERAL MOTORS CORPORATION and ADAM OPEL, A.G.,

Defendants-Appellees.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND, *Circuit Judges.*

This is an appeal from a summary judgment entered on March 30, 1981 in the United States District Court for the Southern District of New York (Honorable Gerard L. Goettel, *District Judge*), dismissing their claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14.

Affirmed.

MICHAEL LESCH, Esq., New York, NY (Shea & Gould, Steven E. Levitsky, of counsel), *for Plaintiffs-Appellants.*

IRVING SCHER, Esq., New York, NY (Weil, Gotshal & Manges, R. Peyton Gibson, Jay N. Fastow, Martin S. Hyman, of counsel; and Otis M. Smith, William B. Slowey, of General Motors Corporation, Detroit, Michigan, of counsel), *for Defendants-Appellees.*

MOORE, *Circuit Judge:*

For three years in the early 1970's, Adam Opel, A.G. ("Opel"), the wholly-owned German subsidiary of General Motors Corporation ("GM"), sold components and engines to Frank Reisner, the owner of a small specialty automobile manufacturing company in Italy, Intermeccanica Automobili, for use in manufacturing a high performance sports car called the Indra. Following Opel's termination of the relationship in 1973, Reisner and his American importer, Indra Imports, Inc., brought this antitrust action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14, claiming that Opel had tied sales of Opel components to sales of engines and had conspired with GM to prevent Reisner from exporting the Indra to the United States. After five years of discovery, the District Court for the Southern District of New York (Goettel, J.), entered summary judgment for the defendants GM and Opel on March 30, 1981, and dismissed the complaint. *Reisner* v. *General Motors Corp.*, 511 F.Supp. 1167 (S.D.N.Y. 1981). The district court viewed Reisner's amended complaint as asserting essentially a tying claim, and it found that Reisner had failed to establish the essential elements of that claim. Plaintiffs do not appeal from the dismissal of their tying claims under Section 3 of the Clayton Act, but argue that the district court improperly dismissed

their claims under Section 1 and 2 of the Sherman Act. Specifically, Reisner argues that GM, Opel, and Reisner's European distributor, Bitter GmbH & Co., engaged in a group boycott to prevent the importation and sale of the Indra in the United States. The district court found meritless the boycott conspiracy allegation, and denied Reisner's motion to file a second amended complaint setting forth such an allegation. Finally, the district court found that plaintiffs had "withdrawn" their monopolization claims, and so it held moot defendants' motion to preclude evidence not already in the record regarding these claims. For reasons set forth below, we affirm.

I.

On this motion for summary judgment, we have drawn the facts of the case from the discovery record and the affidavits submitted by the parties. Where the evidence is susceptible of different inferences, we have taken the reasonable inference most favorable to the plaintiffs, against whom summary judgment was granted. However, we have disregarded those factual claims made by Reisner after GM moved for summary judgment, where those claims contradict statements made previously by Reisner at his deposition, in his affidavits, and in response to defendants' interrogatories. *See Schwimmer* v. *Sony Corp. of America*, 637 F.2d 41, 45-46 (2d Cir. 1980); *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969).

In 1970, Reisner's company, Intermeccanica Automobili, was manufacturing a sports car with a Ford engine called the Italia. Reisner produced approximately 100 Italias per year, most of which he exported to the United States. The bulk of the remainder he sold in Europe through his German distributor, Erich Bitter. Although Reisner sold a total of over 300 Italias in the United States, his American distributors eventually became disenchanted with the car. In this setting, Reisner began negotiations with Opel in September

1970 about the possibility of constructing a specialty sports car with Opel components.

Negotiating with Reisner on behalf of Opel was Robert Lutz, Opel's general sales manager and a member of the Opel board of directors. Lutz was initially interested in Reisner using Opel Diplomat parts in constructing the Italia. The Diplomat had a stodgy image in Germany, and Lutz thought that the sale through Opel dealers of a high performance Italian sports car made with Diplomat parts would generate favorable publicity and showroom traffic for the Diplomat. Thus, at a meeting held on September 4, 1970, at Opel headquarters in Russelsheim, Germany, Lutz, Reisner, and Bitter agreed orally that Reisner would design a car to be built around Opel components. This agreement was never reduced to writing. They arranged that Reisner would build a prototype and two cars in time for the Geneva Auto Show the next year.

Bitter was brought into the deal as Reisner's German distributor, through a new company set up for this purpose, Bitter GmbH & Co. To further insure Bitter's interest in the project, Reisner arranged to have all the Opel components and engines sold directly to Bitter GmbH & Co., which they then supplied to Reisner. With minor exceptions, all the sales of parts and engines were handled in this manner.

At some point, the parties agreed that Reisner would build an all new car using Opel parts and engines. This car was called the Indra. The Opel components to be used in the Indra included drive train components, the brakes, steering wheel and column, and the suspension. Lutz agreed also to supply Reisner with the engine used in the Opel Diplomat, the Chevrolet 327 cubic inch displacement (CID) engine. This was a "dirty" engine, that is, it did not satisfy the emission control requirements for sale in the United States. Reisner was interested eventually in exporting the Indra to the United States, and he secured from Lutz a promise that Opel would provide the "clean" 350 CID engines used in the Corvette. Specifically, Lutz told Reisner that "I am pushing

for that engine, and as a temporary measure use the 327. And I'll make sure you get the 350". Despite Lutz's promise, at no time did Opel use the 350 CID engines in its own cars or have any available for sale to Reisner or to anyone else.

In any event, the Indra could not have been exported to the United States in 1970 because the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, imposed safety requirements on cars sold in the United States that the Indra did not satisfy. Not until late 1972, when the "Checker Amendment" was enacted, providing an exemption for manufacturers of fewer than 10,000 cars per year, did it become possible for Reisner to export the Indra to the United States. To do so, however, required a "clean" engine, and the Indra equipped with the 327 CID engine did not meet the Federal emission standards.

Following the meeting with Lutz and after further consultations with Opel personnel, Reisner set up a production line for the Indra. To do so, he had to dismantle the production line for the Italia. The first Indra was shown at the Geneva Auto Show in the spring of 1971 where it attracted considerable favorable publicity and many orders. However, many of the early Indras were defective and dealer enthusiasm fell off. Nonetheless, 78 Indras were manufactured in 1971-72 and sold in Europe. All were equipped with the 327 CID engine.

Reisner first attempted to acquire the "clean" 350 CID engine in the spring of 1972, when it began to appear that the Checker Amendment might pass. Reisner's first contact was with General Motors Italia SpA, the Italian subsidiary of GM. On May 18, 1972, Reisner sent a letter to Ing. E. Brunati at GM Italia stating that Reisner produced about 150 cars per year and would like to purchase the 350 CID engines in lots of twenty. At that time, and indeed since 1965, the policy of GM's Chevrolet Division was not to sell engines on an original equipment basis in lots of less than 200.

Reisner's letter was referred to William Drury of General

Motors Overseas Operations, which managed GM's overseas business interests in the early 1970's. Drury consulted with Rudy Boniface, the new director of sales at Opel, who told Drury that Reisner could not meet the minimum sales requiremeht. Drury next consulted with the manager of the Special Products Section of Chevrolet, which made the 350 CID engines in question, and he confirmed that Chevrolet continued to require a minimum order of 200 engines. Accordingly, on July 2, 1971, Drury wrote to Boniface at Opel, directing him to inform Reisner that Reisner's request to purchase the 350 CID engines in lots of twenty failed to satisfy the minimum purchase requirement. On July 28, 1972, Opel sent a letter to Reisner that stated: "Because of the low volume involved your Company will not be able to qualify for OE [original equipment] status with Chevrolet". However, the letter went on to assure Reisner that Opel would continue to supply him, through Bitter GmbH & Co., with the Opel engines and components that it had supplied in the past.

Undaunted, plaintiffs continued their efforts to purchase the "clean" 350 CID Corvette engine, without which they could not export the Indra to the United States. In early 1973, Joseph Vos, who became president of plaintiff Indra Imports, Inc. after its incorporation in 1973, made a series of phone calls to General Motors personnel in the United States to inquire whether Reisner could purchase a small quantity of 350 CID engines. However, Chevrolet refused to alter its minimum purchase requirement.

Vos eventually reached Frank Duca, the head of manufacturing sales for the Chevrolet Division. Duca contacted Drury, who in turn asked Boniface at Opel whether Opel wished to see the Indra equipped with the 350 CID engines for sale either in Europe or America. Boniface responded in a telex dated March 16, 1973, that "Opel would not approve use of engines other than the Chevrolet 327 cubic inch on the Indra". Boniface added that the Indra's "quality has been consistently poor with performance and safety of vehicle

questionable. We question the viability of project [sic] and do not feel it to be in the best interests of Opel or the Corporation to expand our engagements with Reisner". By separate letter of the same date, Boniface assured Reisner that Opel would continue supplying Opel component kits and the 327 engines. Reisner, through his attorney, then threatened GM with an antitrust suit unless it agreed to sell him the 350 CID engines "in quantities of 25 to 50 per order". On August 17, 1973, GM refused this request.

As it became clear in late 1972 and early 1973 that GM would not sell him the 350 CID engine in the quantities he desired, Reisner prepared to use a "clean" Ford 351 CID engine instead. As powerful as the Corvette 350 CID engine, the Ford engine was equipped with emission control devices and could be used in Indras built for export to the United States. However, Reisner's plans to use the Ford engine were thwarted when, in February, 1973, Opel informed Reisner that it would not supply him with Opel components for use with engines made by other manufacturers. In a letter to Reisner dated February 13, 1973, Boniface stated: "Opel is willing to continue to supply mechanical components for the INDRA car through Bitter GmbH. The sets will consist of the same prices and materials in the past". This letter was followed on February 23 with a letter to Bitter (copy to Reisner) from A. A. Cunningham, Opel's managing director, objecting vigorously to Reisner's plans to put a Ford engine in the Indra. Cunningham wrote that Opel could not accept such plans "for safety and technical reasons". He emphasized that "we have to make it very clear that we would be forced to discontinue the supply of Diplomat components for the INDRA immediately should these plans be realized". After these exchanges, Opel sold two more 327 CID engines to Reisner in July 1973; these were the last sales Opel made to Reisner.

Plaintiffs filed their initial complaint on May 19, 1976, charging defendants GM and Opel with two counts of violating the Sherman Act, Section 1 and 2. By stipulation

with the defendants, the plaintiffs filed an amended complaint on July 11, 1977. The amended complaint essentially restated the original complaint's allegations under the Sherman Act and added a tying claim under Section 3 of the Clayton Act, 15 U.S.C. § 14.

As amended, the complaint alleges that GM and Opel "sought and caused the elimination of Plaintiffs as competitors in the sub-market for the sale of luxury and specialty cars in the United States". They allegedly did this by conspiring to and refusing to sell Opel components to Reisner unless he also bought the 327 CID engine; by refusing to sell the "clean" 350 CID Corvette engines to Reisner after inducing Reisner to convert his production facilities to the manufacture of Indras with the promise that Opel would supply Reisner with pollution-free engines; and by refusing to sell Opel components to Reisner for use with non-Opel or non-GM engines. These acts effectively precluded Reisner from selling the Indra in the United States, and thereby injured Reisner and his American importer, plaintiff Indra Imports, Inc. The market that GM allegedly sought to monopolize was the "luxury and specialty car market in the United States", which "GM, through its Cadillac division, dominates and has since prior to 1970 dominated . . . each year (selling) more than sixty percent of the new luxury and specialty cars in the United States".

Two months after filing the complaint, Reisner served interrogatories on GM seeking, in part, detailed data relating to market definition and GM's contentions as to the relevant market. The interrogatories asked GM to define "in the context of the automobile industry" the following: "Market"; "geographic market"; "product market"; and the relationship between "geographic" and "product market". It further asked GM to identify "each geographic market, if any, which the United States contains" and "each of the product markets, if any, which the United States contains". For each such market, GM was asked to identify those in which it competed and the "nature" of its competition. GM objected

to this entire line of questions as "indefinite, vague and ambiguous". As to the interrogatories asking GM to identify such things as "each car manufacturer whose products were sold in any market in which products made by [GM] were also sold" or "each market in which [GM products] . . . competed" and each other product (including products manufactured by other manufacturers) which competed with GM products, GM objected on the grounds that the questions were unduly broad, ambiguous and "not reasonably calculated to lead to the discovery of admissible evidence". The record does not indicate that Reisner sought any orders from the court compelling GM to answer these interrogatories.

On August 24, 1979, GM served on Reisner a second set of interrogatories seeking information concerning Reisner's market and submarket definitions, the defendants' alleged market power, and the alleged impact of defendants' conduct on the relevant market or submarket. On September 28, 1979, Reisner returned his answers, most of which stated that Reisner lacked the information to respond to the questions or that the information sought was in GM's hands. GM then filed a motion to compel Reisner to answer, which motion Magistrate Sinclair granted on October 29, 1979. On November 9, 1979, Reisner moved before Judge Goettel to vacate Magistrate Sinclair's order. Judge Goettel affirmed the Magistrate's order, noting that "market analysis is a necessary and indispensable part of [a monopolization] charge". He added that "if plaintiffs wish to withdraw their monopolization claims, the interrogatories need not be answered".

Reisner subsequently filed supplementary answers to GM's second set of interrogatories which GM found unsatisfactory. For example, in response to the question as to the specific models of cars with which the Indra was intended to compete in the United States, Reisner listed over thirty models and added "all other makes and makers of automobiles sold in the United States". Consequently, on November 30, 1979, defendants moved for an order of preclusion against Reis-

ner's monopolization claims under Section 2 of the Sherman Act.

Reisner's opposition to GM's motion to preclude took two forms. On December 18, 1979, Reisner filed a motion for leave to file a second amended complaint. The Notice of Motion stated that the purpose of amending the complaint was to "eliminate vexatious issues under Section 2 of the Sherman Act (15 U.S.C. Section 2), which are raised therein and which have taken up the time of the Court and the parties out of all proportion to their importance in this case". In his memorandum of law in support of plaintiffs' motion for leave to file a second amended complaint, Reisner emphasized that plaintiffs were dropping their Section 2 claims, conceding that "[t]he end of plaintiffs' pursuit of those charges was probably, on the basis of hindsight, inevitable from the start. . . ." Meanwhile, on December 17, 1979, Reisner had served a memorandum in opposition to defendant's motion to preclude, arguing, in essence, that defendants' motion was moot because Reisner's monopolization claims had been withdrawn. Specifically, Reisner stated:

> "Plaintifs, by their Motion for Leave to File a Second Amended Complaint, have withdrawn said monopolization claims. Consequently, there can be no further basis for sanctions against plaintiffs because of a failure to answer interrogatories they are not required to answer."

Besides dropping the monopolization claims, the second amended complaint added new allegations of a group boycott. Although no new defendants were named, Paragraph 26(b) alleged that "Defendants financed automobile manufacturing enterprises to compete with REISNER and to deprive REISNER of engines and parts critical to the production of the INDRA." Paragraph 26(c) added that "Defendants diverted said critical engines and parts away from REISNER to an automobile manufacturing enterprise which

defendants were financing". These cryptic claims apparently arose out of Reisner's discovery in July 1979 that Opel had secretly financed a project with Erich Bitter during 1971-73 to develop a specialty sports car to compete with the Indra. Reisner did not learn of this joint venture between Opel and Bitter until July 10 and July 20, 1979, when GM turned over documents evidencing Opel's investment in Bitter's project.

Reisner's memorandum of law in support of the motion for leave to file a second amended complaint offered no justification for adding any new factual allegations. Indeed, the memorandum asserted that the second amended complaint merely "amplified and clarified the conspiracy allegations" contained in the first amended complaint. The "ultimate issue", said Reisner, is "whether or not GM and Opel engaged in unlawful conspiracy, in violation of Section 1 of the Sherman Act".

In his opinion of March 30, 1981, Judge Goettel denied the motion for leave to file a second amended complaint. For one thing, he found that "[n]o justification for the delay in presenting these new factual allegations and this new theory of recovery is given in the plaintiffs' memorandum in support of their motion". Next, Judge Goettel found that allowing a new complaint to be filed after discovery had been completed on the prior complaint and a motion for summary judgment prepared on the basis of that discovery "would be both prejudicial to the defendants and wasteful of the time of the Court and the attorneys". Finally, Judge Goettel said that the boycott claim appeared meritless:

> "It would be pointless for the Court to allow the plaintiffs to pursue yet another antitrust theory—in accordance with new facts—in what appears to be essentially a contract dispute. . . . This seems to be a particularly inappropriate case in which to find . . . an intra-enterprise conspiracy."

On the motion for summary judgment, Judge Goettel treated the complaint essentially as stating a tying claim,

which he found unsupported in the record. He made no determinations with respect to the monopolization claims, stating only that "the plaintiffs have withdrawn those claims and the Court deems them withdrawn". For the same reason, he held that the defendants' motion to preclude evidence as to the monopolization claims was moot.

Plaintiffs do not appeal from the dismissal of their tying claims or the denial of their motion for leave to file a second amended complaint. Rather, plaintiffs argue that the district court erred in dismissing their claims under Section 1 and 2 of the Sherman Act. Plaintiffs' basic allegation on appeal is that "General Motors, Opel, and a German automobile importer, Bitter GmbH, conspired, in violation of the anti-trust laws, to drive plaintiffs out of business to protect General Motors' sports-car market in the United States". Although the amended complaint contains no allegations about any conspiracy involving Bitter, plaintiffs argue that GM's suppression of the evidence of Bitter's ties to Opel until July 1979 permits plaintiffs to prove the third-party conspiracy without formal amendment of the complaint. Reisner further argues that even without Bitter, the conspiracy between GM and its wholly-owned subsidiary, Opel, violated Section 1 of the Sherman Act. Next, Reisner claims that the monopolization claims are still in the lawsuit because the district court denied leave to file the second amended complaint, which would have dropped the Section 2 claims. Finally, even if plaintiffs waived some or all of these claims below, Reisner argues that we may hear them in the interests of justice.

We hold, first, that plaintiffs waived their claims under Section 2 of the Sherman Act, and that it would not be in the interest of justice to reinstate those claims on appeal. Second, we hold that Reisner's failure to raise in the district court the claim of suppression of evidence of the alleged "Bitter conspiracy" bars him from raising that claim here. Moreover, we find the alleged "Bitter conspiracy" to be utterly without support in the record. Hence, we decline to

remand for trial of the Bitter conspiracy claim. Finally, we hold that GM and Opel did not violate Section 1 of the Sherman Act by refusing to sell "clean" Corvette 350 CID engines to Reisner or Opel components for use with Ford 351 CID engines.

II.

Proof of a relevant product market or submarket is required to state a claim of monopolization or attempted monopolization under Section 2 of the Sherman Act. *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980). Here, GM repeatedly sought to have Reisner state exactly what product market that he alleged GM to have power in and what market GM sought to monopolize. GM was entitled to discovery of Reisner's factual allegations concerning the relevant markets so that GM could prepare its defense. However, the record discloses that Reisner continually changed his allegations concerning the relevant markets and failed to answer properly GM's interrogatories.

The amended complaint referred to the "luxury and specialty car sub-market", which it defined to include cars such as the Ferrari, Lotus, Lamborghini, Cadillac, Mercedes, and Lincoln-Continental. Seeking to clarify the exact sub-market that Reisner would attempt to prove at trial, GM served its first set of interrogatories, asking whether Reisner contended that the manufacture, distribution, and sale of "luxury and specialty" cars constituted one or three separate product markets or if one was a submarket of another. Reisner responded: "Theoretically and depending on your point of view all three propositions in the Interrogatory can be answered yes". To call this response evasive would be an understatement.

During the deposition of Reisner in 1979, GM again attempted to pin down the market alleged by plaintiffs. This time, Reisner referred to a "luxury sports car market", in which he included such cars as the Maserati Ghibli, Ferrari,

Jensen, and Iso, but not the Corvette. The second set of interrogatories that GM served in 1979 was intended to clarify the difference between the "luxury and specialty car market" identified in the amended complaint, and the "luxury sports car" market identified during Reisner's deposition, as well as to force Reisner to specify the basis for his claim that these could constitute markets for antitrust purposes. Reisner's supplemental answers to these interrogatories listed over thirty sports cars against which the Indra was intended to compete, including the Corvette, as well as "all other makes and models of automobiles sold in the United States". This hardly constituted an adequate specification of the market Reisner intended to prove at trial.

Faced with Reisner's constant shifting and refusal to specify the relevant markets in which the Indra competed or in which GM held market power, GM moved to preclude plaintiffs from introducing any evidence in support of their monopolization claims other than that already contained in the record. In opposition to that motion, plaintiffs told the court that they had "withdrawn said monopolization claims". Relying on that representation, the district court held that defendants' motion to preclude was moot. In this context, it is irrelevant that the district court denied the motion for leave to file the second amended complaint, which omitted the Section 2 claims. Plaintiffs' representation to the court that the monopolization claims had been withdrawn was not conditioned on the court granting the motion to file the second amended complaint. Therefore, the district court properly found that the claims under Section 2 of the Sherman Act had been withdrawn and waived.

Nor have plaintiffs shown that it would be in the interest of justice to reinstate the monopolization claim. On the contrary, the claim appears meritless. Because of the paucity of evidence in the record—due principally to Reisner's failures to respond properly to GM's interrogatories—we can only speculate as to the relevant markets. Even so, we can imagine no relevant market in which the Indra was intended

to compete in which GM had achieved monopoly power or was dangerously close to doing so. In the sports car market, the Corvette was only one of many cars in the market. Moreover, the Corvette was in a substantially lower price range than the Indra. Although the Cadillac was in the right price range to compete with the Indra, it was a sedate sedan, whereas the Indra was a high performance sports car. In short, we think it unlikely that the Indra and the Cadillac or Corvette would have been viewed by potential buyers as "reasonably interchangeable". *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). In asking this Court to reinstate the monopolization claim waived below, the plaintiffs bore the burden to show the merits of that claim, and we find that the plaintiffs have failed to carry that burden here.

Next, plaintiffs claim that Bitter, GM and Opel engaged in a conspiracy to prevent Reisner from exporting cars to the United States. Although he did not raise this claim in the district court, Reisner argues that we may review the merits of this claim because evidence of this "Bitter conspiracy" was suppressed by GM and Opel. Moreover, plaintiffs claim that GM's suppression of this evidence permits them to prove the "Bitter conspiracy" at trial without formally amending their complaint. However, plaintiffs' failure to raise the claim of suppression in the district court bars them from raising here either that claim or the underlying claim that Bitter conspired with GM and Opel.

Reisner alleges that GM failed to disclose evidence of the "Bitter conspiracy" until July of 1979, after plaintiffs had already deposed Bitter. Following this disclosure, Reisner filed his motion for leave to file a second amended complaint. The proposed second amended complaint contained an oblique reference to "automobile manufacturing enterprises" that the defendants had allegedly "financed . . . to compete with Reisner". Nowhere was Bitter mentioned by name. Nor did plaintiffs' motion for leave to file the second amended complaint or counsel's affidavit in opposition to defendants'

motion for summary judgment (which is dated March 10, 1980) mention anywhere either the suppression of evidence about Bitter or even the allegation that the conspiracy included Bitter. Because plaintiffs had the opportunity to raise the suppression claim in the district court, and failed to do so, they are barred here.

Moreover, we find that the allegations that Bitter conspired with Opel and GM to be fanciful and without support in the record. Essentially, Reisner argues that conspiracy can be inferred from the following facts: (1) Opel had invested in a project with Bitter to build a car that would compete with the Indra and (2) Bitter, to whom Opel sold the components and engines destined for Reisner, never objected when Opel breached its promise to supply the 350 CID engine to Reisner and decided not to supply Opel components for use with non-Opel engines. From these facts, Reisner argues that we can infer that Bitter agreed to help GM and Opel prevent Reisner from exporting cars to the United States, in return for which Opel helped Bitter build a car to compete with the Indra in Europe. However, there is no plausible motive for such a conspiracy. Neither GM nor Opel needed Bitter to effectuate their determination not to deal with Reisner. GM simply refused to sell the 350 CID engines to Reisner. Likewise, Opel told Reisner—through the copy that it sent him of the letter sent to Bitter—that it would not supply Opel components for use with the Ford 351 engine. Finally, plaintiffs cite no evidence indicating that Bitter took any action, or indeed, could have taken any action, to prevent Reisner from getting the equipment that he needed. Bitter's failure to protest Opel's or GM's refusal to deal with Reisner on the terms that Reisner wanted is insufficient evidence to support an inference that Bitter conspired with GM and Opel. Hence, we find that it would not be in the interests of justice to permit plaintiffs to pursue this claim at trial.

Reisner's remaining claim, that GM and its wholly-owned subsidiary, Opel, conspired in violation of the Sherman Act to exclude him from the United States market, is likewise

without merit. What the record discloses here is a commercial venture that went sour. At most, the evidence shows that Opel breached two promises to Reisner. It failed to sell him the 350 CID Corvette engines that Lutz assured Reisner he would get. And it unilaterally stopped supplying Reisner with Opel components and 327 CID engines in late 1973. Reisner's effort to convert what is essentially a claim sounding in contract into an antitrust conspiracy claim is unavailing because the basic premise of this alleged plot is simply incredible. *See Diehl & Sons, Inc.* v. *International Harvestor Co.*, 426 F.Supp. 110, 117 (E.D.N.Y. 1976). If Opel desired to eliminate or exclude Reisner from competing either with GM in the United States or with Bitter in Europe, then it would not have made the Indra possible in the first place. The antitrust laws were "not designed to police the performance of private contracts", *Madison Fund, Inc.* v. *Charter Co.*, 406 F.Supp. 749, 751 (S.D.N.Y. 1975), and Reisner's disappointment with Opel's performance of its alleged agreements is not redressable under those laws.

Finally, neither GM's refusal to supply Reisner with the 350 CID Corvette engine nor Opel's refusal to supply Opel parts for use with Ford engines support an inference of conspiracy. GM never agreed to sell the 350 CID engines to Reisner. It had sole control over those engines and was well within its rights, *see United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), in refusing to sell them to Reisner in lots of less than 200. Likewise, GM violated no law by seeking the advice of its subsidiary as to the possible disadvantages of dealing with Reisner or in communicating its unilateral refusal to deal with Reisner through Opel. Nor is there any evidence that Opel's refusal to sell Opel components for use with Ford 351 engines was the result of an agreement with GM or for any reason other than its own commercial interests. The record discloses that Opel had some concerns about the safety of the hybrid car. More important, Opel's purpose in entering the Indra project with Reisner was to garner favorable publicity for the Opel Diplomat. Selling

Opel parts for use in a Ford-powered car would have frustrated that purpose; therefore, Opel was perfectly justified in refusing Reisner's request.

Affirmed.

United States Court of Appeals
for the
SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the eighth day of February one thousand nine hundred and eighty-two.

Present: HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND

FRANK REISNER, d/b/a INTERMECCANICA AUTOMOBILI, and INDRA IMPORTS, INC., Plaintiffs-Appellants,	:	
v.	:	81-7332
GENERAL MOTORS CORPORATION and ADAM OPEL, A.G., Defendants-Appellees.	:	

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said

District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. Daniel Fusaro, Clerk

By: /s/ Edward J. Guardaro,
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK REISNER, d/b/a INTERMECCANICA AUTOMOBILI, and INDRA IMPORTS, INC., Plaintiffs,	:	
v.	:	76 Civ. 2241 (GLG)
GENERAL MOTORS CORPORATION and ADAM OPEL, A.G., Defendants.	:	OPINION

GOETTEL, D.J.:

The plaintiffs in this antitrust action are Frank Reisner, a Canadian citizen now living in California, who owned and operated a small automobile manufacturing company in Italy, and Indra Imports, Inc., a New Jersey corporation, which was Reisner's importer and distributor in the United States. The defendants are General Motors Corporation, the giant manufacturer of automobiles and other products, and Adam Opel, A.G., a wholly owned General Motors subsidiary, which is incorporated in Germany.

Factual Background

In 1970, Reisner's company, Intermeccanica Automobili, in Turin, Italy, was manufacturing a sports car called the Italia, which was powered by a Ford engine. In the early fall of that year, Frank Reisner met with Robert Lutz, the General Sales Manager of Opel, and discussed Reisner's manufacturing a new car using General

Motors engines and certain components[1] used in the Opel Diplomat. Reisner then designed and began to manufacture his new car, the Indra, using the Opel drive train components and a Chevrolet 327 engine, which was the General Motors engine used in the Opel Diplomat. The first Indra was shown at the International Auto Show in Geneva, Switzerland, in the spring of 1971. For the next two years, Reisner manufactured Indras, with Opel components and Chevrolet 327 engines purchased from Opel through a German company (Bitter GmbH & Co. KG) established by Erich Bitter, who was Reisner's distributor and representative in West Germany, Switzerland, and the Benelux countries. Reisner attepted to sell his cars in Germany through Opel distributors, apparently without marked success.[2]

In May 1972, Reisner contacted General Motors Italia SpA, an Italian subsidiary of General Motors, seeking to purchase the Chevrolet 350 engine for the Indra so that he could sell his car in the United States.[3] The Chevrolet 350

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[1]The Opel components included front and rear suspension parts and axles, the braking system, and the steering wheel and column.

[2]Approximately one hundred Indras were manufactured during those years, including about thirty-three in 1971 and forty-five in 1972, although initially approximately two hundred had been planned for 1971 alone. Many orders for the Indra (about one hundred and seventy) were received from the Opel dealers who saw the prototype Indra at the Geneva auto show. Orders apparently fell off after defects were discovered in the Indras delivered to the dealers. The plaintiffs and the defendants disagree as to the seriousness and pervasiveness of the defects.

[3]Reisner apparently became actively interested in the United States market for the Indra at that time because of the introduction in Congress in the spring of 1972 of the "Checker Amendment" to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq*. The amendment, which was enacted in October 1972, provided for an economic hardship exemption from the requirements of the Act for manufacturers of fewer than ten thousand automobiles per year.

not only was more powerful than the Chevrolet 327, but also, unlike the Chevrolet 327, was equipped with pollution control devices that would qualify it for sale in the United States. Reisner had mentioned that his annual production was about one hundred and fifty cars and expressed an interest in purchasing engines in lots of twenty. After he was advised in July 1972 that General Motors would not sell the engines in the low volume he was proposing,[4] Reisner and Joseph Vos, who became the president of Indra Imports, Inc. when it was incorporated in May 1973, made further attempts to purchase Chevrolet 350 engines from General Motors. General Motors never agreed to sell the engines to Reisner.

Unable to buy the Chevrolet 350, Reisner prepared to use the Ford 351 engine, which was equipped with pollution control devices adequate for the United States market, in the Indra. Thereafter, in February 1973, Opel informed Reisner that it would not sell him Opel components for use with the Ford 351 engine. Vos then renewed his attempts to persuade General Motors to sell Reisner the Chevrolet 350 in the numbers he required (less than the announced minimum of two hundred engines per year). He was unsuccessful.

Reisner claims that as a result of these events he had to abandon his automobile manufacturing business in Italy. Both plaintiffs claim substantial losses in investment and profits.

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[4]General Motors had a policy of requiring a minimum order of two hundred for Chevrolet engines, although smaller orders were still filled for a few manufacturers under arrangements that predated the institution of the policy.

Reisner's purchase of the Chevrolet 327 engines had not been affected by the policy apparently because he purchased the engines from Opel, not from General Motors. Opel did not use the Chevrolet 350 engines and would not have been in a position to sell them to Reisner.

Procedural Background

The plaintiffs filed their original complaint on May 19, 1976, alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. By stipulation with the defendants, the plaintiffs filed an amended complaint on July 11, 1977, expanding their factual allegations and adding a claim under section 3 of the Clayton Act, 15 U.S.C. § 14. As amended, the complaint alleges essentially a tying violation under section 1 of the Sherman Act and section 3 of the Clayton Act. Although the complaint alleges a monopolization violation under section 2 of the Sherman Act, the plaintiffs have not pursued that claim and appear to have dropped it. [5]

The defendants moved to dismiss in August 1977, and the motion was denied on November 7, 1977. Over the next two years, extensive discovery was taken. On December 18, 1979, after discovery had been completed and while motions for summary judgment were being prepared, the plaintiffs moved for leave to file a second amended complaint, which the defendants (understandably) opposed. On February 14, 1980, the defendants filed their motion for summary judgment,[6] which was argued on March 14, 1980. For months thereafter, the parties, principally the plaintiffs, continued to file additional voluminous, unauthorized papers.

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[5] *See* discussion of the proposed second amended complaint *infra*.

[6] Although the plaintiffs at least partially prepared their own motion for summary judgment, they never filed it with the court.

Second Amended Complaint

The plaintiffs assert that their proposed second amended complaint is needed for three reasons:

> (i) to eliminate vexatious issues under Section 2 of the Sherman Act (15 U.S.C. Section 2), which are raised therein and which have taken up the time of the Court and the parties, out of all proportion to their importance in this case; (ii) to guard against misunderstanding and misinterpretation of the conspiracy allegations in the Amended Complaint, which the existing record shows is a possible risk; and (iii) to amplify and update the allegations of the Amended Complaint by reference and incorporation therein of matters previously unknown to Plaintiffs, which became known only during the recent discovery which the Court allowed Plaintiffs to conduct.

(Notice of Motion at 1.) They also assert that the "proposed pleading does not raise new issues"; "will not operate . . . to the prejudice of any party"; and will "further the interests of justice, hasten the setting of a trial date, and expedite disposition of this case." (*Id.* at 2.) The defendants vigorously oppose the granting of leave to file a second amended complaint, arguing that the motion is untimely, made in bad faith, designed to forestall the granting of summary judgment, prejudicial to the defendants, and clearly dilatory.

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading should "be freely given when justice so requires." Granting or denying such leave, however, is within the discretion of the court, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), which has an obligation to determine whether

allowing the amended pleading will cause substantial prejudice to the other parties or substantial inconvenience. 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1484 (1971).

Despite the plaintiffs' assertions that the proposed second amended complaint raises no new issues, it does seem to add a new theory of recovery – that of group boycott[7] – in Count Three, which includes paragraphs 36-51. Moreover, it adds many new factual allegations, several of which seem to be inconsistent with allegations in the earlier two complaints[8] or seem to be facts that should have been within the plaintiffs' knowledge at the time the earlier complaints were drafted.[9]

No justification for the delay in presenting these new factual allegations and this new theory of recovery is given in the plaintiffs' memorandum in support of their motion. None is given in their moving papers, except those already quoted, which, as is noted above, are inapplicable to most of the new factual allegations. In this context, the

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[7] *See* discussion *infra*.

[8] For example, the proposed second amended complaint states: "At all relevant times, plaintiffs REISNER and VOS were engaged in a joint venture for the sale of the *INDRA* in the United States, and may be referred to herein as "REISNER/VOS." Not only do the earlier complaints fail to mention this "joint venture," but they describe the relationship between Reisner and Vos in terms inconsistent with the existence of a joint venture. At any rate, the existence of a joint venture between Reisner and Vos was certainly within the knowledge of the plaintiffs when the original complaints were drafted.

[9] For example, the terms of an alleged oral agreement between Reisner and Opel on September 4, 1970, are spelled out in great detail. Surely Reisner knew all this even better in 1976 and 1977 than at the end of 1979. This could not have been information that "became known only during the recent discovery which the Court allowed Plaintiffs to conduct."

view of the proposed pleadings as an attempt to forestall a ruling against the plaintiffs on a motion for summary judgment is not incredible.[10] Such a motivation for a new complaint would clearly justify denial of permission to file it. *Kirby v. P.R. Mallory & Co., Inc.*, 489 F.2d 904, 912-13 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Roorda v. American Oil Co.*, 446 F. Supp. 939, 947-48 (W.D.N.Y. 1978); *Billy Baxter, Inc. v. Coca-Cola Co.*, 47 F.R.D. 345, 350 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

More important, it appears that granting the plaintiffs leave to amend their complaint after discovery has been completed on the basis of the first amended complaint – and a motion for summary judgment has been prepared on the basis of that discovery – would be both prejudicial to the defendants and wasteful of the time of the Court and the attorneys. Such a situation, also, is adequate justification for denying leave to amend. *Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 969 (1978); *Rogers v. Valentine*, 426 F.2d 1361, 1363 (2d Cir. 1970); *Roorda v. American Oil Co., supra*. To the extent that the proposed second amended complaint adds new or inconsistent factual allegations, new discovery would be needed to allow the defendants to respond to the new facts and the new legal theory. That would delay considerably[11] the disposition of this case,

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[10]The shifting of a legal theories and adding of inconsistent allegations raise a substantial doubt as to the good faith of the plaintiffs' counsel in asserting them. The Federal Rules of Civil Procedure admonish an attorney not to sign a pleading unless "to the best of his knowledge, information, and belief there is good ground to support it" and "it is not interposed for delay." Fed. R. Civ. P. 11.

[11]The history of this particular litigation makes this Court especially apprehensive about the delay that additional discovery would cause. Discovery in this action has been protracted and acrimonious, and

which is already nearly five years old, the next to oldest case on this Court's docket, and a "judiciary emergency."[12] It would be pointless for the Court to allow the plaintiffs to pursue yet another antitrust theory – in accordance with new facts – in what appears to be essentially a contract dispute,[13] and it would be prejudicial to the defendants to require them to expend the additional time and money needed to defend themselves against the proposed second amended complaint at this late date.

An additional reason for denying leave to amend is that a brief look at the proposed boycott claim demonstrates further the futility of allowing this action to continue. The plaintiffs allege that Opel and General Motors conspired "to prevent the importation and sale of the *Indra* in the United States." Allegedly as part of the conspiracy, Opel and General Motors "refused to sell to plaintiffs Chevrolet 350 CID pollution-free engines" and "refused to sell Opel components to plaintiffs if plaintiffs attempted to use in the *Indra* an engine manufactured or sold by a supplier other than GM or Opel."

A parent corporation and a subsidiary may in some circumstances be considered independent conspirators under section 1 of the Sherman Act, *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 215 (1951). Although this Court makes no determination at this time as to whether the defendants could be shown to be independent conspirators, for several reasons, this

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enormous amounts of paper have already been generated, some of it literally just paper – *e.g.*, massive photocopies of massive documents already submitted.

[12]A case constitutes a judicial emergency when it becomes three years old.

[13]*See* note 25 *infra* and accompanying text.

seems to be a particularly inappropriate case in which to find such an intra-enterprise conspiracy.

First, the cases in which an intra-enterprise conspiracy has been found have generally been price-fixing cases. *See, e.g., Timken Roller Bearing Co. v. United States, supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra.* No case has been cited in which a conspiracy to boycott on the part of a parent and its wholly owned subsidiary has been found; indeed, the Second Circuit has explicitly left open the question of whether a group boycott conspiracy could be found in such a situation. *See International Railways of Central America v. United Brands Co.*, 532 F.2d 231, 240 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). *See also Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976) (expressing skepticism toward the doctrine of intra-enterprise conspiracy).

Second, the conduct alleged here is essentially consultation between General Motors and Opel concerning company-wide General Motors policies for the sale of General Motors engines to other manufacturers. A parent corporation and its subsidiary surely must be able to consult on some matters of company policy without violating the antitrust laws – absent a demonstration of anticompetitive motivation. *See Joseph E. Seagram and Sons v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The consultations involved here are well within the range of normal business activities between a parent and a subsidiary. And no evidence of an anticompetitive objective has been presented.

Finally, the allegation that there was a group boycott conspiracy between General Motors and Opel to prevent

the importation and sale of the Indra in the United States seems rather bizarre, since the Indra was *created* only after Opel had agreed to supply Opel components and Chevrolet 327 engines to Reisner. If Opel and General Motors were concerned with preventing the Indra from being sold in the United States, why did Opel make its creation possible? *C.f. Speed Auto Sales, Inc. v. American Motors Corp.*, 477 F. Supp. 1193, 1196 (E.D.N.Y. 1979) ("no logical basis" for anticompetitive conspiracy since the supposed beneficiary of the conspiracy could have accomplished the objective alone); *Diehl & Sons v. International Harvestor Co.*, 426 F. Supp. 110, 117 (S.D.N.Y. 1976) (same).

Accordingly, the plaintiffs' motion for leave to file a second amended complaint is denied.

Summary Judgment Standard

The general rule that summary judgment should be used sparingly in antitrust cases, *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), does not mean that summary judgment should never be used in such cases. Awarding of summary judgment in antitrust cases in which there was "no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), has found approval in the Supreme Court, *see, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), and in this circuit. *See, e.g., Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., Inc.*, 614 F.2d 832 (2d Cir. 1980); *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975). The Supreme Court has stated:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point

> of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

First National Bank of Arizona v. Cities Service Co., supra, 391 U.S. at 290. Summary judgment is particularly appropriate where, as in the instant case, there has already been extensive discovery. *See First National Bank of Arizona v. Cities Service Co., supra; Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., Inc., supra.*

Of course, in order to prevail on their motion for summary judgment, the defendants, as the moving party, must show that there is "no genuine issue as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Moreover, in making its decision, the Court must view the facts "in the light most favorable" to the party opposing the motion – in this case, the plaintiffs, *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962) (per curiam); *FLLI Moretti Cereali S.p.A. v. Continental Grain Co.,* 563 F.2d 563 (2d Cir. 1977), and "resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." *Heyman v. Commerce and Industry Insurance Co.,* 524 F.2d 1317, 1320 (2d Cir. 1975). The party opposing the motion, however, "may not rest upon the mere allegations or denials of his pleading," but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Factual Issues

The defendants have attempted to meet their burden of showing the absence of genuine issues as to any material fact by submitting the required statement pursuant to Rule

3(g) of the Civil Rules for the United States District Court for the Southern District of New York.[14] The plaintiffs, however, have filed no "statement of the material facts as to which it is contended that there exists a genuine issue to be tried," as Rule 3(g) requires of a party opposing a motion for summary judgment. Technically, the result of the plaintiffs' omission is that the facts alleged by the defendants are deemed to be admitted. *Katz v. Realty Equities Corp.*, 406 F. Supp. 802, 804 (S.D.N.Y. 1976). Indeed, the Second Circuit has affirmed the granting of summary judgment in such a situation. *See Securities and Exchange Commission v. Research Automation Corp.*, 585 F.2d 31, 34 (2d Cir. 1978).

Instead of filing the type of Rule 3(g) statement required of a party opposing summary judgment, the plaintiffs have filed a Rule 3(g) statement of material facts as to which they allege there is *no* genuine issue to be tried – but without an accompanying motion for summary judgment. However inappropriate it may be, the plaintiffs' Rule 3(g) statement does differ somewhat from the Rule 3(g) statement of the defendants. In addition, the plaintiffs' affidavits either explicitly or implicitly refer to several issues of fact. Consequently, the Court will overlook the plaintiffs' technical deficiency.[15]

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[14]Rule 3(g) was formerly (before October 31, 1980) Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

[15]Ironically, the plaintiffs, in papers filed on April 1, 1980, moved to strike certain paragraphs of the defendants' Rule 3(g) statement, on grounds of noncompliance with the rule. The plaintiffs also moved to strike the affidavits of Alexander C. Cunningham and William B. Slowey and the defendants' document entitled "Plaintiffs' Record Admissions . . . ," all of which were submitted in support of the defendants' motion for summary judgment, on grounds of, *inter alia*, noncompliance with the requirements of Rule 56(e) of the Federal Rules

Factual disputes that are not material to the determination of the case, however, will not prevent the granting of summary judgment. Fed. R. Civ. P. 56; *Securities and Exchange Commission v. Research Automation Corp., supra,* 585 F.2d at 35. Thus, the remaining question is whether the issues here are issues of material fact.

The plaintiffs explicitly denominate two issues of fact: (1) "whether or not defendants' disparagement of Reisner and of the car Reisner produced was justified or true" (Affidavit of Nick C. Spanos at 14); and (2) whether there were "conditioned sales" from the defendants to Reisner (*id.* at 101 *passim*). In addition, several other issues of fact, although they are not denominated as such, are clearly implied from the differing statements of the facts by the plaintiffs and the defendants. Among these issues are: whether Opel or Reisner initiated the idea of designing a new car using the components and engines used in the Opel Diplomat; whether General Motors had a policy of not selling Chevrolet 350 engines in amounts smaller than two hundred; whether General Motors had a policy of testing for pollution control non-General Motors cars with General Motors engines; whether Opel promised Reisner it would sell him Chevrolet 350 engines; whether the Chevrolet 350 engine would be unsafe or infeasible in the Indra; whether Opel competed with General Motors; and when the first discussions of Reisner's using Chevrolet 350 engines of his cars took place.

Of all the issues of fact explicitly or impliedly raised by the plaintiffs' papers, none is material to the plaintiffs' claim of a tying violation except the issue of whether there were conditioned sales.[16] Conditioned sales, which are a

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of Civil Procedure. Since the Court is overlooking the technical deficiencies in the plaintiffs' papers, it will do likewise with the alleged deficiencies in the defendants' papers.

necessary element of a tying violation, are sales by a defendant of the tying product (here, Opel drive train components) on the condition that the purchasers also buy the tied product (here, Chevrolet 327 engines), or at least agree not to buy a competitor's version of the tied product.[17] There was no dispute on this issue until plaintiff Reisner submitted an affidavit dated February 29, 1980, two weeks before the summary judgment argument. Reisner's deposition, taken in the spring of 1979, as well as the other depositions and documents submitted by both sides on this motion for summary judgment, offer no support for the proposition that Reisner was required to buy unwanted Chevrolet 327 engines in order to get the Opel components he wanted. But Reisner states in his affidavit of February 29, 1980, that the 327 engine was "forced down our throats" and that he "never wanted" it (Affidavit of Frank Reisner, Feb. 29, 1980, at 2). Although he admits that he stated in his deposition that he "wanted every 327 engine [he] could get" (*id.* at 3), he says he didn't mean it (*id.*).[18] A plaintiff surely cannot be permitted to defeat a motion for summary judgment, thus compelling a defendant to defend himself in an antitrust trial, simply by contradicting his earlier version of the facts, thereby creating an internal consistency in the plaintiff's story.

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[16]Under either the Sherman Act or the Clayton Act, there are at least two essential elements of a tying violation, conditioned sales and a resulting anticompetitive effect on a not insubstantial amount of commerce in the tied product market. *See* tying discussion *infra*. All of the other factual disputes mentioned are immaterial to both of those elements.

[17]*See* discussion *infra*.

[18]Reisner also submitted on March 6, 1980, on the eve of the summary judgment hearing, hundreds of pages of "corrections" to his deposition taken from March to July of 1979. Some of these corrections were of typographical or spelling errors. Others, however, were substantive, such as changing "Yes" to "No" or adding new paragraphs to the deposition testimony. The defendants have submitted affidavits from the stenographers who recorded the deposition testimony, stating that their transcripts as originally submitted were correct, except for minor typographical or spelling errors.

mary judgment, thus compelling a defendant to defend himself in an antitrust trial, simply by contradicting his earlier version of the facts, thereby creating an internal consistency in the plaintiff's story.

The Tying Claims

In order to prevail on their motion for summary judgment, besides showing that there are no issues of material fact, the defendants must also show that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Since the plaintiffs have adduced no evidence to support their monopolization claim and indeed have stated that it was inevitable that the claim would be dropped (Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Leave to File A Second Amended Complaint at 1), the legal theory against which the plaintiffs' allegations must be tested is that of tying.

Tying is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway v. United States*, 356 U.S. 1, 5-6 (1958). The first product – in the instant case, allegedly, the Opel components – is the tying product. The second – here, allegedly, the Chevrolet 327 engines – is the tied product. The evil in tying is that the seller's leverage in the tying product market enables it to "deny competitors free access to the market for the tied product." *Id.* at 6.

Tying is a *per se* violation of both section 1 of the Sherman Act and section 3 of the Clayton Act.[19] The elements

[19]Tying can also constitute a "rule of reason" violation. The plaintiffs seem to have dropped this claim, however, since they have not attempted to define the relevant markets and, during the discovery

of the violation under the two statutes are very similar. Section 3 of the Clayton Act states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. Thus, the elements of a violation of section 3 are: (1) sales of goods for use, consumption, or resale within the United States; (2) sales conditioned on the purchaser's not dealing in the goods of a competitor; (3) a potential effect of substantial lessening of competition in the market for the tied product. Section 1 of the Sherman Act is much more general, stating simply: "Every contract, combination in the form of trust or otherwise, or

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period, have adduced no evidence regarding the foreclosure of those markets, as is required under the rule of reason. *See, e.g., Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 615 (1953). Nor have they presented evidence of unlawful intent on the part of the defendants, as is also required. *See id.* at 614-15.

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Thus, the specific requirements of a tying violation under that statute must be found in the case law. A recent Second Circuit case lists five elements: (1) a tying product and a tied product; (2) "evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; (3) the seller's possession of "sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; (4) "anticompetitive effects in the tied [product] market"; (5) involvement of a 'not insubstantial' amount of interstate commerce in the tied product market." *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir. 1980).

Two differences between the statutes are that under the Clayton Act both products must be goods, whereas under the Sherman Act they could also be services, and that the Clayton Act includes a requirement that the goods be for use, consumption, or resale within the United States. The first of these Clayton Act requirements need not detain us because clearly the products involved here are goods. The second requirement, however, bears mentioning. Since the relevant sales in the instant case were sales in Europe of Opel components and Chevrolet 327 engines for Indras to be sold in Europe for use in Europe (except possibly the two sets of components Reisner ordered in July 1973, *see* note 24 *infra*), they would not satisfy the Clayton Act requirement of use, consumption, or resale within the United States. Another difference between the two statutes is that Sherman Act tying requires that the seller have economic power in the tying product market, whereas the Clayton Act omits this requirement.[20] Other-

[19] See discussion *infra*.

wise, proof of tying under one statute essentially satisfies the requirements of the other.

Basic to a tying violation under either statute is the requirement of conditioned sales. In the Clayton Act, this requirement is expressed in those words: "sale. . . of goods . . . on the condition . . . that the . . . purchaser. . . not use . . . the goods . . . of a competitor . . . of the . . . seller." Under the Sherman Act, the requirement is expressed in terms of the seller coercing the buyer of the tying product into buying the tied product also. The situation at which both statutes aim, however, is the same – a seller using a wanted product to force sales of an unwanted product, either directly, by requiring buyers to buy the second product to get the first, or indirectly, by forbidding buyers of the wanted product to buy a competitor's version of the unwanted product. The Second Circuit has stated that "no tying arrangement can possibly exist unless the person aggrieved can establish that he has been required to purchase something which he does not want to take." *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658, 662 (2d Cir. 1974).[21]

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[20]The "unremitting policy of tie-in," which under some circumstances can substitute for coercion, *see Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976), is appropriate only in a situation such as that in *Hill*, where the policy was applied to all buyers. Here, there is no evidence that the defendants required all purchasers of Opel components to buy Chevrolet 327 engines or not to buy engines from the defendants' competitors. Indeed, there is no evidence of who, if anyone, besides Reisner bought Opel components from the defendants. The plaintiffs seem to suggest that the defendants' consistent refusal to sell Reisner Opel components for use with a Ford engine makes an unremitting policy to tie. Such conduct cannot constitute an unremitting policy to tie in violation of the antitrust laws, which are designed to promote competition in the marketplace as a whole, not to protect an individual buyer. *See, e.g., Levin v. National Basketball Association*, 385 F. Supp. 149, 152 (S.D.N.Y. 1974).

Such a situation does not exist here. The plaintiffs assert that they were required to purchase unwanted Chevrolet 327 engines in order to get wanted Opel components, or that they were denied the right to buy the Opel components for use with the Ford 351 engines.[22] There is no evidence,[23] however, that the Chevrolet 327 engines Reisner purchased were unwanted. To the contrary, there is considerable evidence that Reisner avidly pursued the purchase of the Chevrolet 327 engines for use in the Indras he was manufacturing for the European market.[24]

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[22]The idea that the defendants were coercing Reisner into buying unwanted products seems strange indeed here, since the history of Reisner's deteriorating relationship with the defendants suggest very strongly that during 1972 and 1973 the defendants were trying to get out of selling Reisner anything. Coercion is an essential element of tying because the theory of the violation is that tying arrangements "foreclose a substantial quantity of business to competition and extend pre-existing economic power to new markets for no good justification." *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972). Rather than trying to extend into new markets, the defendants seemed to be running from this market – at least insofar as Reisner was involved.

[23]The only exception is Reisner's affidavit of February 25, 1980, which has already been discussed and which contradicts all other evidence submitted, including Reisner's depositions.

[24]There is some support for Reisner's claim that he made clear to the defendants throught his relationship with them that he wanted Chevrolet 350 engines eventually for Indras that could be sold in the United States. But the relevant question for tying is not whether Reisner wanted the 350 engines, but whether he did *not* want the 327's.

The only possible unwanted 327 engines were the two that Reisner himself bought when he ordered components directly from Opel on June 20, 1973, after his relationship with Erich Bitter had ended. These purchasers were the only ones made after Reisner had been informed that he would not be sold Opel parts for use with the Ford 351 engines. The earlier sales to Reisner could not have been conditioned or coerced by the defendants' refusal to sell Opel components without the Chevrolet 327 engines, because they were made at a time when Reisner did not know that the defendants would not sell the Opel components without the Chevrolet 327 engines. If these last two sales were conditioned sales, they were certainly *de minimis*.

The other essential element of tying under both statutes is that of an anticompetitive effect on a not insubstantial amount of commerce in the market for the tied product. This element is also lacking in the instant case. The understanding that Reisner arrived at with Opel in September 1970 for the purchase of Opel components and Chevrolet 327 engines appears to have been a special arrangement. Only one buyer – Reisner – was affected by it. Reisner made relatively few purchases in total – approximately one hundred sets of engines and components over a three-year period – and only two of those were conceivably tied. *See* note 24 *supra*. This does not appear to be the sort of conduct the antitrust laws were meant to prohibit.

The cases speak of the effect on an "appreciable number of buyers" in the tied product market. *See, e.g., Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I)*, 394 U.S. 495, 504 (1969). The plaintiffs cite no tying case in which only one contract between one buyer and one seller constituted a violation of the antitrust laws.[25] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), which the plaintiffs do *not* cite, did involve a single contract, but that was a twenty-year requirement contract

[25]Numerous cases are filed in the federal district courts attempting to make antitrust claims out of what are, at most, contracts claims or fraud claims involving conduct between two parties. Such cases are troublesome because of the inherent difficulty of trying to prove a negative and because of the exceedingly broad and general language of the antitrust laws, particularly the Sherman Act. Such claims are regularly dismissed, however, after taking up considerable amounts of judicial time. *See e.g., Bucher v. Shumway*, 452 F. Supp. 1288, 1291-93 (S.D.N.Y. 1978) (fixing the price of a particular securities purchase was not cognizable under the antitrust laws); *Madison Fund, Inc. v. Charter Co.*, 406 F. Supp. 749, 751 (S.D.N.Y. 1975) (antitrust laws "not designed to police the performance of private contracts").

worth $128,000,000. And the Supreme Court found that it did *not* tend to foreclose a substantial volume of competition and thus found no tying.

The evidence of suppression of competition presented by the plaintiffs in this case consists of data about the number of Opel and General Motors automobiles manufactured and sold during certain years. (*See* Plaintiffs' Statement of Material Facts ¶ 29.) Although the plaintiffs recite these figures after the introductory statement that the "volume of interstate commerce effected [*sic*] by the wrongful acts of the defendants is not insubstantial," the Court does not see how the defendants' behavior toward Reisner affected this commerce.[26] More important, this is not the relevant market for a tying violation. The market where suppression of competition must be found in order to support the plaintiffs' claim in the instant case is the market for engines, not the market for automobiles. Since no evidence has been presented concerning the size of the market for engines, it is difficult to determine the percentage foreclosed; but no engines – or, at most, two, *see,* note 24 *supra* – certainly cannot represent a substantial percentage. Moreover, there is no

[26]As already been emphasized, the "not insubstantial" effect must be in the market for the tied product – that is, automobile engines.

Among the figures cited by the plaintiffs is that of "26,299,255 cars domestically manufactured by GM" in the period 1971-1976. The plaintiffs assert that these cars "were affected by the aforesaid restrictive GM sales policy which prevented a purchaser of a GM car to have a non GM engine of purchaser's choice installed in said car at the time of purchase." As has already been noted, the finished automobile market is not the relevant market for establishing tying of the engines to certain components. Furthermore, the Court finds the fact that General Motors cars are sold with General Motors engines neither surprising nor an antitrust violation. "[I]t does not constitute a tying arrangement for an auto dealer to require purchasers of cars to also buy the engines from him. . . ." *Beefy Trail, Inc. v. Beefy King International, Inc.,* 348 F. Supp. 799, 806 (M.D. Fla. 1972).

evidence that the market for engines was a market the defendants were trying to foreclose or that any competitors were being foreclosed. *See Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1292-93 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974). It is common knowledge that the defendants compete with Ford, the Japanese producers, and other automobile companies in the sale of automobiles, not in the sale of engines.

For tying under the Sherman Act, but not under the Clayton Act, the seller's economic power in the tying produce market must also be shown. This element, too, is lacking in the instant case. The plaintiffs allege that the defendants were the only source of the tying product, the Opel components; thus, it is claimed, the defendants obviously had sufficient economic power to coerce the purchase of the tied product, the Chevrolet 327 engines. But the tying product market cannot consist of *Opel* components; it must consist of *automobile* components, unless, of course, the Opel components were unique. The only thing that made the Opel components unique in the instant case is that Reisner designed his car around them. (His earlier car, the Italia, had not used Opel parts, so it was obviously feasible to build a sports car without them.) Some special advantage inherent in the product, however, not the plaintiff's own action or choice, is required to make a product unique.[27] The Supreme Court has recently narrowed the concept of the uniqueness that is needed to create sufficient economic power in the tying product market. *See United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*, 429 U.S. 610 (1977), in which the

[27]The focus of the inquiry is on the seller rather than on the individual buyer. *Hill v. A-T-O, Inc.*, 80 F.R.D. 68, 69 (E.D.N.Y. 1978). To the extent that the instant opinion is inconsistent with this Court's earlier opinion on the motion to dismiss, the earlier opinion was erroneous.

Court discussed uniqueness in restrictive terms and found unusually favorable credit terms insufficiently unique.

Since the essential elements of tying under either the Sherman Act or the Clayton Act appear to be absent in this case, summary judgment should be granted in favor of the defendants.

Summary

The plaintiffs' motion for leave to file a second amended complaint is denied.[28] The plaintiffs' motion to strike is also denied.[29] For the reasons stated herein, the defendants' motion for summary judgment is granted. Since summary judgment is granted in favor of the defendants, the defendants' motion to preclude[30] and the defendants' motion for an order permitting the filing and use of unsigned deposition transcripts[31] are rendered moot.

SO ORDERED.

/s/ Gerald L. Goettel
U.S.D.J.

Dated: New York, N.Y.
March 30, 1981

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[28] *See* discussion *supra*.

[29] *See* note 15 *supra*.

[30] The defendants moved in December 1979 to preclude the plaintiffs from introducing evidence not already in the record regarding the monopolization claims. Since the plaintiffs have withdrawn those claims and the Court has deemed them withdrawn, and since the Court has decided that the case could not proceed to trial, no purpose is served by deciding the motion.

[31] This motion was made in March 1980 to permit the filing of unsigned deposition transcripts of Frank and Paula Reisner and to strike the changes made in the depositions. *See* note 18 *supra*. Since the Court has decided that the case should not proceed to trial, there is no need to decide this motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK REISNER, d/b/a INTERMECCANICA AUTOMOBILI, and INDRA IMPORTS, INC., Plaintiffs,	:	
v.	:	76 Civ. 2241 (GLG)
GENERAL MOTORS CORPORATION and ADAM OPEL, A.G., Defendants.	:	

ENDORSEMENT

Defendants move to reargue their earlier motion to dismiss. The motion to reargue is granted, but, on reconsideration, the prior denial of the motion is adhered to.

Defendants argue that the express language of Section 3 of the Clayton Act requires an actual conditioned sale in commerce, but that there were no conditioned sales here, and that the previous sales were neither conditioned nor "in commerce".

We need not consider the interesting question which might exist had there been no prior transactions between the parties. As the earlier opinion made clear, the defendants sold components and engines to the plaintiffs. The amended complaint alleges that plaintiffs wished to continue purchasing the components without the compulsion of purchasing those engines, but that defendants will not let them do so.

Defendants contend that the Second Circuit requires a showing of actual compelled sales to establish an unlawful tying arrangement citing *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974). It is true that the complaint does not indicate whether prior purchases of the allegedly tied and tying goods were, to plaintiffs' knowledge, coercived sales. It cannot be disputed, however, that "an unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under *Capital Temporaries,* given foreclosure of a not insubstantial volume of interstate commerce" *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976). The element of known compulsion or the fact that the purchaser is a willing victim is irrelevant so long as actual economic muscle has been exerted through the tie-in policy accomplished in previous sale. *See American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972).

Defendants also argue (for the first time) that the previous sales cannot be considered since they were not "in commerce". The basis for this argument is that the engines sold did not meet federal emission standards and, therefore, could not be used in the United States. This novel argument proceeds on several factual assumptions not presently before the Court, (*i.e.*, because the engines purportedly cannot be used in this country, they are not "in commerce" although they are allegedly sold and shipped from here), and are not ripe for determination.

It may be, in the final analysis, that the refusal to sell the Opel component parts in the United States is, as defend-

ants argue, a mere refusal to deal, unconnected with an interest in selling the engines. It may be established ultimately that defendants simply do not want Opel type cars marketed in the United States by a competitor. Such a desire, however, may implicate the Sherman Act, rather than Clayton. It is, therefore, a matter which must await a trial on the merits for determination.

SO ORDERED:

/s/ GERALD L. GOETTEL
U.S.D.J.

Dated: New York, N.Y.,
February 9, 1978.
Filed: February 10, 1978.